Supreme Court, U.S.
FILED
JAN 25 1993
OFFICE OF THE

No. 91-1131

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WINTERTHUR REINSURANCE CORP. OF AMERICA,
Petitioner,

v.

STATE OF CALIFORNIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

SUPPLEMENTAL MEMORANDUM FOR PETITIONER PURSUANT TO RULE 15.7

RONALD C. REDCAY
Counsel of Record
ARNOLD & PORTER
777 South Figueroa Street
Forty-Fourth Floor
Los Angeles, California 90017
(213) 243-4000

PHILIP H. CURTIS
WILLIAM H. VOTH
ARNOLD & PORTER
399 Park Avenue
New York, NY 10022
(212) 715-1000

DOUGLAS L. WALD
ANNETTE M. LANG
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6700
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1131

WINTERTHUR REINSURANCE CORP. OF AMERICA,
Petitioner,

v.

STATE OF CALIFORNIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

SUPPLEMENTAL MEMORANDUM FOR PETITIONER PURSUANT TO RULE 15.7

Petitioner, Winterthur Reinsurance Corp. of America ("Winterthur"), respectfully submits this supplemental memorandum to address the significance to Winterthur's Petition of Respondents' Brief, filed on December 23, 1992, in Nos. 91-1111 and 91-1128 ("Resp. 91-1111 Br.").

Respondents' 91-1111 Brief demonstrates that they lack antitrust standing to challenge the purported conduct on which respondents argue that they rely to avoid the McCarran-Ferguson Act. Petitioners' Brief in 91-1111 and 91-1128 demonstrated that the complaints challenge only an agreement on the terms of insurance, which is protected by the McCarran-Ferguson Act. Respondents

try to avoid that defect by recharacterizing the complaints as alleging acts of boycott, coercion or intimidation more broadly restrictive of competition. But, by expressly asserting that the purported acts of boycott, coercion or intimidation were directed against nondefendant primary insurers, respondents implicitly concede their lack of standing.

Respondents claim that, "[r]educed to essentials, the complaints allege that the defendant primary insurers enlisted reinsurers 'to compel capitulation' by competing primary insurers to the defendants' demands." (Resp. 91-1111 Br. 2.) For reasons reviewed in Petitioner's Briefs in Nos. 91-1111 and 91-1128, respondents' characterization of their complaints is ineffective to avoid the McCarran-Ferguson Act. Simply put, they have not alleged a collective refusal to deal with the nondefendant primary insurers on any terms or to discriminate between favored and disfavored entities in the provision of insurance. Only such allegations are sufficient to state a violation under the McCarran-Ferguson Act, but even then only the boycotted or disadvantaged primary insurer can challenge that violation. The alleged anticompetitive conduct in such a boycott is directed at obtaining the capitulation of these nondefendant (and nonconspirator) primary insurers. Accordingly, such conduct could injure respondents, as customers of such primary insurers, only indirectly.

Respondents' own statement of their claim refutes the court of appeals' summary conclusion that respondents suffered a "direct injury." Respondents' Brief expressly asserts that the nondefendant primary insurers, not plaintiffs, were "the direct target of the boycott." (*Id.* at 29 n.32.) Each description of the alleged conspiracy confirms that any alleged anticompetitive conduct was directed at these non-conspiring primary insurers. (*See, e.g., id.* at 13 ("The complaints allege that defendants combined to compel competing insurers to sell only those insurance prod-

ucts approved by the cartel"); 15 (complaints "allege conduct to force non-conspiring insurers to adhere to cartel terms"); 16 ("defendants combined to force competitors [*i.e.*, the nondefendant primary insurers] to adhere to their cartel's demands").) Straining to read their complaints as alleging much more than an agreement on insurance terms, respondents assert that they alleged "concerted refusals to deal designed to prevent firms from competing effectively." (*Id.* at 18; *see also id.* at 21 ("the reinsurers conspired to refuse to deal with insurers in the United States who offered the insurance products primary insurers wanted to ban").)

If the complaints are viewed, as plaintiffs contend, to allege such a concerted refusal to deal designed to prevent the boycotted firms from competing effectively, they fail to state a claim for which respondents have standing. Only the boycotted firms' injury is direct for antitrust standing purposes. *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 541 (1983). The boycotted firms therefore have a right to maintain a treble-damage action against the defendants. *Id.* Any injury suffered by the customers of the boycotted firms, such as respondents, is indirect and speculative and any recovery therefore necessarily poses a danger of duplicative recovery. In these circumstances, respondents' indirect harm is insufficient to confer standing notwithstanding allegations that defendants intended to cause them harm. *Id.* at 537, 545.

* * * * *

Respondents have sought to navigate this case between the Scylla of the McCarran-Ferguson Act and the Charybdis of antitrust standing, either of which is fatal. Respondents crafted their complaints to steer as far away as they could from the antitrust standing bar by alleging simply an agreement on the terms of insurance. These allegations minimize the directness of the harm suffered

by the nondefendant primary insurers and the consequent indirectness of respondents' harm, which are the most significant factors denying respondents' standing. However, now that respondents are more threatened by the McCarran-Ferguson Act as a result of the Court's grant of certiorari on those issues, they characterize their case as a boycott of the nonconspiring primary insurers. That characterization, if accepted, runs foursquare into antitrust standing. Accordingly, if this Court, in Nos. 91-1111 and 91-1128, were to find that the complaints alleged conduct of boycott or coercion outside the protection of the McCarran-Ferguson Act, it should grant Winterthur's Petition for Certiorari and resolve the standing issue for reasons described more fully in the Petition and in Winterthur's reply and supplemental briefs.

Respectfully submitted,

RONALD C. REDCAY
Counsel of Record
ARNOLD & PORTER
777 South Figueroa Street
Forty-Fourth Floor
Los Angeles, California 90017
(213) 243-4000

PHILIP H. CURTIS
WILLIAM H. VOTH
ARNOLD & PORTER
399 Park Avenue
New York, NY 10022
(212) 715-1000

DOUGLAS L. WALD
ANNETTE M. LANG
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6700

Counsel for Petitioner

January 1993